

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 19, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP479-CR

Cir. Ct. No. 2013CF506

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT E. HALL, SR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Robert Hall, Sr., appeals a judgment convicting him of substantial battery with the intent to cause bodily harm-domestic abuse and disorderly conduct-domestic abuse, both counts as a repeater and a domestic abuse repeater. Hall argues the circuit court erroneously exercised its discretion in

admitting other acts evidence. We reject Hall's arguments and affirm the judgment.

BACKGROUND

¶2 The charges in this case arose from allegations that Hall broke the ankle of his girlfriend, S.B., by repeatedly stomping on it during an argument. Hall, who had been drinking, accused S.B. of sleeping with someone else and also punched walls and kicked closet doors during the altercation. Over Hall's objection, the State sought to introduce other acts evidence at trial to refute any claim of accident or self-defense. The evidence consisted of eight incidents that also involved S.B. After a hearing, the circuit court concluded the following seven incidents were admissible:

(1) In 2008CM275, Hall had been drinking, began yelling at S.B. and calling her names for no reason, and then hit her on the left side of her face.

(2) In 2008CM1724, Hall had been drinking, began yelling at S.B., and threatened to kill her and her children.

(3) In 2009CM190, Hall had been drinking, began yelling at S.B., and then grabbed her. After S.B.'s son, who witnessed the events, told Hall to leave his mother alone, Hall threw S.B.'s son into a dresser and grabbed S.B. by the neck and threw her down.

(4) In 2009CM1152, Hall had been drinking, began yelling at S.B., and then held her down on the bed. When S.B. tried to leave, Hall followed her, grabbed her, and held onto her until her son intervened.

(5) In 2009CM1480, Hall had been drinking, began yelling and using profane language towards S.B., and pushed her up against a wall.

(6) In 2011CM12, Hall had been drinking, began yelling at S.B., and punched her in the face.

(7) In 2012CF709, Hall had been drinking and was "acting drunk and crazy." Hall was yelling at S.B. and

threatened to “whoop her ass” and drew his hand back like he was going to hit her. S.B. was able to walk away, but Hall ran up behind her and grabbed her arm.

¶3 Hall subsequently pleaded no contest to the disorderly conduct charge, and was found guilty after a bench trial of substantial battery. The court imposed and stayed consecutive sentences totaling five and one-half years, and imposed concurrent three-year probation terms with six months of conditional jail time. This appeal follows.

DISCUSSION

¶4 The admissibility of evidence lies within the circuit court’s sound discretion. *State v. Pepin*, 110 Wis. 2d 431, 435, 328 N.W.2d 898 (Ct. App. 1982). The court must engage in a three-step analysis to determine the admissibility of other acts evidence. *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998). The first inquiry is whether the other acts evidence is offered for an acceptable purpose under WIS. STAT. § 904.04(2) (2013-14),¹ such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* at 772-73.

¶5 After ascertaining whether the other acts evidence is offered for a permissible purpose under WIS. STAT. § 904.04(2), the analysis turns to whether the other acts evidence is relevant. In assessing relevance, the court must first consider whether the other acts evidence relates to a fact or proposition that is of consequence to the determination of the action. *Sullivan*, 216 Wis. 2d at 772. The second consideration in assessing relevance is whether the other acts evidence

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. *Id.* at 772-73. Finally, the court must determine whether the evidence’s probative value outweighs the danger of unfair prejudice. *Id.*

¶6 Here, Hall concedes the other acts evidence was offered for a permissible purpose—namely, to prove intent or absence of mistake. With respect to the first consideration in assessing relevance, we conclude the other acts evidence related to witness credibility, which “is always consequential within the meaning of WIS. STAT. § 904.01.” *State v. Hurley*, 2015 WI 35, ¶81, 361 Wis. 2d 529, 861 N.W.2d 174. Other acts evidence is relevant to undermine a defendant’s innocent explanation for what occurred. *State v. Roberson*, 157 Wis. 2d 447, 455, 459 N.W.2d 611 (Ct. App. 1990). Because the other acts evidence in this case could aid the trier of fact in assessing the credibility of Hall’s claim that S.B.’s injuries were accidental, the evidence related to a fact of consequence.

¶7 Turning to the second consideration in assessing relevance, “[t]he measure of probative value in assessing relevance is the similarity between the charged offense and the other act.” *State v. Davidson*, 2000 WI 91, ¶67, 236 Wis. 2d 537, 613 N.W.2d 606. Hall argues the other acts evidence was not relevant because it did not involve conduct similar to Hall’s conduct in this case. Citing *Sullivan*, Hall contends that none of the earlier incidents involved the level of physical contact alleged in this case. Hall’s reliance on *Sullivan* in this regard is misplaced. There, the State had to prove Sullivan intentionally hit his girlfriend. *Sullivan*, 216 Wis. 2d at 788. The other acts evidence consisted of evidence that Sullivan had one previous argument with his ex-wife in which there was no physical contact, but rather name-calling and a threat of assault. *Id.* at 779. The *Sullivan* court concluded the evidence “[t]hat the defendant confronted and argued

with his ex-wife, threatened her, swore at her and refused to leave her house does not make it more probable that he intentionally hit [his girlfriend] during an argument two years later.” *Id.* at 789.

¶8 By contrast, the other acts evidence in the present case consisted of a series of events establishing Hall’s escalating violence against S.B. *See id.* at 788 (noting Sullivan’s other act was one isolated event, not a series of incidents). Further, as the circuit court noted, the other acts were not remote in time, as they had occurred within the last five years. In terms of similarity, the court recognized that all of the acts involved the same victim and “all involve some drinking, then an argument, followed by abusive behavior, threats, and/or physical violence.” We are satisfied that the other acts evidence served to make it less probable that Hall did not intend to harm S.B. or that S.B. injured herself. Therefore, the evidence satisfied the second aspect of *Sullivan*’s relevancy analysis.

¶9 With respect to the third step in the analysis—whether the evidence’s probative value outweighs the danger of unfair prejudice—Hall argues the evidence was unfairly prejudicial as “no human mind has the capacity to set aside the inference that Hall must have broken S.B.’s ankle because he has an abusive character trait.” Hall’s claim of unfair prejudice, however, assumes the evidence had only “minimal” probative value. As noted above, the other acts evidence was highly probative of credibility, a central issue in the case.

¶10 Although the circuit court recognized the “danger” that a jury may use other acts evidence to improperly assume a defendant has the propensity to act in conformity with past acts, it determined the evidence was properly admitted

only to refute any claim that the injury was either self-inflicted or the result of self-defense on Hall's part.² The circuit court also acknowledged that any prejudicial effect could be mitigated by a cautionary jury instruction. Ultimately, the record reflects an adequate weighing of proper factors and supports the circuit court's determination that the evidence's probative value outweighs any prejudice. The circuit court, therefore, properly exercised its discretion when admitting the other acts evidence. In addition, by the time the trial was held, the legislature had codified and expanded the greater latitude rule in WIS. STAT. § 904.04(2)(b)1., to include a greater latitude of proof with regard to other acts evidence in domestic abuse cases.³

¶11 Even were we to conclude the other acts evidence should not have been admitted, any error in doing so was harmless. The harmless error test applies to claims that the circuit court erroneously admitted other acts evidence. *State v. Thorns*, 228 Wis. 2d 868, 873, 599 N.W.2d 84 (Ct. App. 1999). “The test for harmless error is whether there is a reasonable possibility that the error contributed to the conviction.” *Id.* at 873. The beneficiary of the error has the burden of establishing that the test has been met. *Id.* “[W]e focus on whether the error

² The circuit court's decision to admit other acts evidence was made before Hall opted for a bench trial on the substantial battery charge.

³ The greater latitude rule was expanded to apply to crimes involving human trafficking, all crimes against children as defined in WIS. STAT. ch. 948, all serious sex offenses as defined in WIS. STAT. § 939.615(1)(b), and domestic abuse crimes as defined in WIS. STAT. § 968.075(1)(a) or domestic abuse crimes subject to the domestic abuse surcharge under WIS. STAT. § 973.055. See WIS. STAT. § 904.04(2)(b)1.

Unless otherwise specified, the effective date of an act is the day after publication. WIS. STAT. § 991.11. The publication date of 2013 Wisconsin Act 362, which contained the newly created § 904.04(2)(b)1., was April 24, 2014. Therefore, the laws contained therein became effective on April 25, 2014. Trial to the court was held on April 30, 2014.

undermines our confidence in the case's outcome, and to do so, we must consider the error in the context of the entire trial and consider the strength of untainted evidence.” *Id.* (internal citation omitted).

¶12 Here, as the State properly recounts, the circuit court gave a detailed and thorough explanation of the verdict, including explicit assessments of witness credibility. The court found that Hall's explanation for how S.B.'s injuries occurred was not feasible. Although the court mentioned Hall's prior acts, it was only in the context of the repeater and domestic abuse enhancers. The court did not mention the other acts evidence in its assessment of Hall's credibility. Because the record does not support any claim that the court relied on the other acts evidence in rejecting Hall's version of events, we conclude the State has met its burden of establishing there is no reasonable possibility that the error, if any, in admitting the evidence contributed to Hall's conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

